IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-873

SHEARN MOODY, JR. and JOHN S. BLEKER,
Petitioners,

vs.

THE STATE OF TEXAS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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INTRODUCTION

The petition presently before this Court is still another effort by Shearn Moody, Jr. to undo the liquidation of the Empire Life Insurance Company of America and the reinsurance of its insurance policies by respondent, Protective Life Insurance Company. The efforts of petitioner, Shearn Moody, Jr., to prevent the liquidation and reinsurance of Empire have produced a virtually never-ending stream of litigation. They have resulted in findings of civil and criminal contempt against Moody. *See Ex parte*

Shearn Moody, Jr., 351 So. 2d 538 (1977) (criminal contempt); *Moody v. State ex rel. Payne*, 351 So. 2d 547 (1977) (civil contempt). The efforts have uniformly been unsuccessful. Citations of some of the reported decisions in this litigation appear below:

Moody v. State, ex rel. Payne, 295 Ala. 299, 329 So. 2d 73 (1976);

Moody v. State, ex rel. Payne, 344 So.2d 160 (1977);

Moody v. State, 520 S.W.2d 452 (Tex.Civ.App.-Austin 1975);

Empire Life Ins. Co. v. State, 492 S.W.2d 366 (Tex.Civ. App.-Austin 1973);

Moody v. Crook, 520 S.W.2d 958 (Tex.Civ.App.-Austin 1975);

Moody v. Jones, 519 S.W.2d 536 (Tex.Civ.App-Austin 1975);

Day v. State, 489 S.W.2d 368 (Tex.Civ.App.-Austin 1972, n.r.e);[1]

Moody v. Moody Nat'l Bank, 522 S.W.2d 710 (Tex.Civ. App.-Galveston 1975, n.r.e.);

Moody v. Texas, 538 S.W.2d 158 (Tex.Civ.App.-Waco 1976, writ ref'd n.r.e. 1977).

This is the fourth petition for a writ of certiorari from this Court sought by Moody relating to Empire.[2] He is joined in this

[1] Indicates denial of review by the Texas Supreme Court upon a finding of "no reversible error" (n.r.e.).

[2] Previous petitions have been denied in:

Ex parte Shearn Moody, Jr., No. 76-1845, *cert. denied* 10/3/77, *rehearing denied* 11/28/77;

Shearn Moody, Jr. v. Texas, No. 77-571, *cert. denied*, 12/5/77;

Shearn Moody, Jr. v. State of Alabama ex rel. Payne, No. 77-428, *cert. denied* 12/12/77.

petition by his first cousin, Shearn Bleker, who intervened in the proceedings below. The three previous petitions have all been denied by this Court.

This petition seeks review of proceedings in the District Court of Travis County, Texas, which court appointed an ancillary receiver in Texas to assert jurisdiction over Empire's assets which were located in Texas when the main receivership proceeding was commenced in Alabama.

As this Court will recall from its consideration of Moody's petition in *Moody v. State of Alabama, et al.*, No. 77-428, following a ten-day evidentiary hearing, on June 14, 1975, the Alabama or main receivership court ordered the liquidation of Empire and the reinsurance of its policies with Protective pursuant to a reinsurance treaty filed with the court by Protective. The Alabama Supreme Court affirmed, and this Court denied certiorari on December 12, 1977.

At the time of the June 14, 1975 order, most of Empire's assets were under the jurisdiction of the Texas ancillary receiver. Following the approval of the Protective treaty by the main receivership court, the Texas ancillary receiver applied for an order from the court below authorizing him to transfer the Empire assets under his jurisdiction to the Alabama receiver so they could be transferred to Protective in accordance with the terms and provisions of Protective's reinsurance treaty. A second ten-day hearing commenced in Texas at which Moody was represented by six lawyers and, following the hearing, the trial court entered an order authorizing the ancillary receiver to transfer those assets to Protective. The Texas Court of Appeals affirmed. *Moody v. State*, 538 S.W.2d 158 (Ct.Civ.App.-Waco 1976). The Supreme Court of Texas denied Moody's petition for a writ of certiorari, finding no reversible error in the proceedings. Moody now seeks a writ of certiorari from this Court.

A large part of petitioners' brief is merely a reprint of unmeritorious arguments previously made by Moody in his previous petition in Case No. 77-428. The balance of the arguments, as we show in this brief, are wholly without merit.

STATEMENT OF THE CASE

1. The Petitioners

Moody is a former chief executive officer and controlling stockholder of Empire. Bleker is Moody's first cousin and owns a $5,000 policy and 300 shares of Empire common stock (R. 1155-56, 1161, 1199, 606-608; Rec. Exhs. 19, 19A).

2. Events Leading to the Reinsurance Treaty

Empire became an Alabama company in one of numerous mergers engineered by Moody (R. 260). In 1968 an examination of Empire's financial condition was initiated by numerous representatives of affected insurance departments (R. 1205). The examination was recessed and renewed in 1969, but was not finally completed until 1971 (R. 1207-1208). The reason for the delays and recesses was to allow Empire time to work out problems regarding its solvency (R. 1216-1218). The examination reported that Empire was insolvent in excess of $6,000,000 (Receiver's Exhs. 19 and 19A). On June 29, 1972, the Commissioner of Insurance of the State of Alabama sought and obtained an order from the Alabama court appointing a receiver for Empire (R. 28). As Empire had been made an Alabama corporation by Moody, the receivership proceeding in Alabama became the domiciliary or main receivership proceeding. Thereafter, the court below, the District Court of Travis County, Texas, appointed Tom McFarling, the Texas statutory liquidator, temporary ancillary receiver of Empire to safeguard assets

of Empire in Texas (R. 28). Other ancillary receivership proceedings were commenced in the States of Arkansas and Montana (R. 1738).

Because Empire was insolvent in excess of $6,000,000, court orders in the Alabama and Texas receivership proceedings placed restrictions on the payment of policyholders benefits. Specifically the courts ordered that the receiver pay to policyholders only 50% of the cash values of Empire policies which could be withdrawn voluntarily prior to death. This prevented a "run on the bank" and bought time for the receivers to seek a solution to Empire's insolvency (R. 282-283). Initially, pursuant to the order of the Alabama receivership court, the Alabama receiver sought to "rehabilitate" Empire with a view toward ultimately eliminating the company's insolvency and terminating the receivership (R. 28). After more than a year of study and efforts at rehabilitation, the Insurance Commissioners of the States of Alabama, Arkansas, Montana, Nebraska, North Dakota, Oklahoma, and Texas, met in Helena, Montana, on August 29, 1973, to consider whether efforts at rehabilitation should continue or whether the domiciliary receiver should seek to reinsure Empire's policies with a solvent company and liquidate Empire (R. 30, Rec. Exh. 1). The commissioners determined unanimously that further efforts at rehabilitation would be hazardous to Empire's policyholders and resolved that the Alabama receiver advertise for solvent insurance companies to submit reinsurance proposals (Rec. Exh. 1). The Alabama receiver then sought and received approval from the domiciliary receivership court to solicit reinsurance proposals for Empire. Three formal bids—from Protective, Banker's Union Life Insurance Company and Mutual Savings Life Insurance Company—were received. In addition, Moody and others presented plans for rehabilitation (R. 31-35).

Following receipt of the bids, the Texas ancillary receiver hired an eminently qualified and fully independent actuary and

reinsurance specialist from San Francisco, California, Dr. A. C. Olshen, to study the bids and recommend which one, if any, should be accepted by the domiciliary receiver (R. 35-36, 293-297, Rec. Exh. 13). Dr. Olshen studied the proposals in depth and collected and analyzed voluminous data on Empire, its policies and financial condition (R. 299, 321, 362, Rec. Exh. 7). Thereafter, the insurance commissioners met with Dr. Olshen and discussed each bid with the representatives of the respective companies. Following this session, the six insurance commissioners and Dr. Olshen unanimously recommended that the Protective proposal be accepted provided that Protective agree to certain amendments to provide policyholders greater protection. Each of these amendments was negotiated with Protective and incorporated into the Treaty (R. 38-39).

3. **The Necessity for a Reinsurance Treaty; the Protective Treaty.**

Because of the tremendous asset deficiency of Empire, the responsible insurance commissioners were faced with four alternatives.

First, the Empire stockholders could pay in cash or contribute liquid assets to put Empire in an acceptable asset position. The commissioners officially made this offer in the resolution adopted in Helena in 1973, by stating:

> The principal stockholder or stockholders may by depositing with the Receivership Court sufficient funds and by naming management acceptable to the Commissioners, Superintendents and Courts, rehabilitate the company at any time prior to the date of final hearing.
>
> Receiver's Exh. 8, p.2.

The Commissioners had been in constant contact with Empire since 1969 and this option had always been open to Moody (R. 38, 1137-1187). Therefore, for a period of four years, and

indeed, up to and through the hearing in the instant case, a period of six years, Moody never offered to inject additional capital to restore Empire to solvency (*Id.*).

Second, the Commissioners could simply nurse Empire along and continue to accept premiums from unsuspecting policyholders, knowing that the time would probably come when the company could not pay policy benefits. In spite of one of Moody's witness' recommendation of this course, another testified that only an injection of outside capital could save Empire (R. 654). This course also would cause the position of Empire to further deteriorate thus diminishing or eliminating the chance of obtaining reinsurance. The dangers of this course to the policyholders made its continuation unthinkable (R. 414, 1757-1759; Bench Comments, p. 2).

Third, the Commissioners could simply liquidate Empire. Liquidation would increase the already existing asset deficiency because Empire's assets would bring less on liquidation than they were carried on the company's books. (R. 1761). Based on estimates of liquidation values, the Ancillary Receiver estimated a loss of an additional approximately $8,500,000 in the event of liquidation without reinsurance (R. 62-64). Straight liquidation without reinsurance also would have totally deprived the policyholders of benefits under their policies. Those policyholders who had passed insurable age or suffered health problems would have been uninsurable and would not have even recovered their full cash value. Those persons who had, in reliance on the receivership court's protection, paid premiums after the date of receivership would not even obtain 100% return of their premiums paid since that date. Therefore, those persons who had paid some $6,000,000 in premiums during receivership would not have gotten their money back.

The fourth, and the only practical alternative, was to seek reinsurance with a responsible company in order to protect the policyholders.

A reinsurance treaty is a contract whereby one insurance company assumes and accepts the insurance policies of another company. Because the reinsuring company becomes liable on these policies and is required by statute to create reserve liabilities for the policies, the company ceding the policies must convey assets to the reinsuring company to offset the reserve liabilities. Empire, however, was insolvent and could not transfer assets equal in value to the reserve liabilities on its policies. Thus, in order for a company to reinsure Empire's policies without sustaining a loss, a contractual limitation had to be placed on some of the policy benefits thereby reducing the reserve liabilities on the policies.

The reason for reinsuring Empire's policies was to obtain a guarantee from a financially responsible company that full policy benefits would be paid at maturity and that withdrawable cash values would be fully restored to the Empire policyholders in the future. During the period of the receivership, policyholders have been paying approximately $3,000,000 in premiums annually to the receiver (Def. Exhs. 22-23). The receiver, though receiving these premiums, was in no position to assure that the policyholders would ultimately receive the benefits for which they were paying. In fact, it became apparent during the course of the receivership that instead of improving, Empire's condition was rapidly deteriorating, creating an even greater hazard to policyholders than existed when the company was initially placed in receivership (R. 414, 1757-1759). *Even Moody's own expert witness acknowledged that unless outside capital was put in the company, which Moody refused to do, the company could not be rehabilitated* (R. 654). Thus, the insurance commissioners and receivers determined that they must try to procure a written guarantee from a financially responsible company that all policyholder benefits would ultimately be restored (Rec. Exh. 1).

After a full hearing of all of the evidence, Judge Jones became convinced that this was the only prudent alternative. He specifically stated from the bench following the trial:

> [One alternative is] for the receiver to do nothing and for this court to do nothing but let it ride and see if some dear, dim, distant day in the future it will all work out.
>
> . . . I am going to say with whatever certainty and conviction I have, I am not going to preside over such an operation and receive a couple of million dollars a year from unknowing policyholders and in the hope that it might sometime work out. I think that is highly irresponsible. I think that suggestion is not worthy of much consideration, because if it does not work out, certainly the receivers have no resources by which they could make anybody whole. The only thing they can do if it does not work out is to hope for some reinsurance plan, which I suppose all of us agree would be less attractive than we have available.
>
> (Bench Comments, p.2).

Protective's proposal provided in meticulous detail how the disparate groups of Empire's policyholders would be treated. It was much more detailed and carefully thought out than the other bids received (Compare Rec. Exhs. 2, 3, 6). It guarantees the payment of all death benefits under all of Empire's policies (Rec. Exh. 6, p. 20). It placed a limitation called a "moratorium" of 35% (Later increased to 50%)[3] on all cash benefits that could be exercised voluntarily by Empire policyholders. These benefits included cash values for policies (the amount of cash that can be received if the policy is voluntarily surrendered for cash) loan values and the like (Rec. Exh. 6, p. 4). The Protective treaty provided for full payment of all cash benefits accruing after its effective date, so that policyholders who continue to pay premiums are receiving full policy benefits accruing on account of current premiums (Rec. Exh. 6, p. 24).

The moratorium reduced the reserve liability on Empire's policies to approximately the amount that its assets could be

[3] See Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama in No. 77-428, at 10-12.

carried on Protective's balance sheet (R. 1378-1380). Protective guaranteed that at the end of ten years this moratorium would be eliminated and that all policy benefits would be returned to accepting policyholders. Protective further committed to calculate annually a ratio of Empire's assets to its reserve liabilities and reduce the moratorium as the asset-liability ratio improved (Rec. Exh. 6, 1st Amdt. 2; R. 24-26).

The Protective treaty is structured so that Protective receives no profit until the moratorium has been completely eliminated and all policyholder benefits are restored to all accepting Empire policyholders not later than ten years from the effective date of the treaty (R. 238-239, 440, R. Exh. 6, pp. 27-29). All positive cash flow which might accrue from Empire's assets and from premium income prior to the complete restoration of all benefits to the Empire policyholders will be added to the Empire assets to improve the asset-liability ratio and thereby reduce the moratorium under the treaty (*Id.*). Of course, Protective has assumed the risk that Empire's multi-million dollar insolvency cannot be eliminated in ten years, and if this is the case, Protective will suffer a substantial loss as a result of the Treaty (R. 1374-1379).

The Protective Treaty provides that an "assumption certificate" be mailed to each Empire policyholder, which certificate creates a binding contract between Protective and the policyholder pursuant to the terms of the reinsurance treaty unless expressly rejected by the policyholder (Rec. Exh. 6, pp. 37-38). The policyholder is free to reject the Treaty and file a claim for breach of contract against the Empire receiver which retained $2,000,000 in cash for payment of these and other claims. To assure that policyholder who reject the Protective Treaty are not discriminated against, Protective provided in its Treaty for re-transfer to the receiver of assets equal to the reserve liability on the policy of each rejecting policyholder (less the moratorium amount applicable to the policy, so that the

pro rata share of the Empire assets attributable to each rejecting policyholder will be returned to the receiver and added to the $2,000,000 fund (*Id.*).

4. **Approval of the Treaty by the Alabama and Texas Courts.**

Following the recommendation by the insurance commissioners that the Protective Treaty be accepted, the Alabama receiver filed a petition with the domiciliary receivership court seeking authorization to accept, execute and carry out the Treaty. After a ten day trial in which Moody was represented by four lawyers, the main receivership court found and concluded in its June 14, 1975 order: (1) that Empire was impaired in excess of $10,000,000 and insolvent in excess of $6,000,000; (2) that further efforts to rehabilitate Empire would be useless; (3) that it was in the best interests of Empire policyholders for Empire's policies to be reinsured by a reputable and solvent insurance company and that Empire be liquidated; (4) that the interests of the Empire policyholders could not be reasonably secured and protected in the absence of such reinsurance; (5) that no stockholder, including Moody, had presented a rehabilitation plan not involving substantial and undue risk to the Empire policyholders; (6) that Protective had capital and surplus in excess of $25,000,000; and (7) that Protective's proposal best protected the interests of Empire's policyholders, was fair, reasonable, non-discriminatory and fully in accordance with all applicable law (Rec. Exh. 9).

As stated above, a unanimous Alabama Supreme Court affirmed the trial court's order approving the Protective reinsurance treaty, *Moody v. State ex rel. Payne,* 344 So. 2d 160 (1977), and this Court denied certiorari, No. 77-428 (1977).

Approximately six months later a second ten-day trial commenced in the trial court below to determine whether authority

should be granted to the ancillary receiver to transfer Empire's Texas assets to Protective. Moody and his cousin, Bleker, were given unlimited opportunity to adduce any and all evidence on why the authority should not be granted. Moody was represented by six separate lawyers who presented evidence on the minutest details of the Treaty and the financial condition of Empire. At the conclusion of the hearing, Judge Jones concluded that there was no prudent alternative to the Protective reinsurance treaty and that it was in the best interests of the policyholders of Empire for the Treaty to be approved and such authority granted. His bench comments are quoted in part above.

ARGUMENT

I. The Hearing Below Was Just, Fair and Equitable.

Petitioners' first argument is that they were deprived of a "just, equitable, fair and impartial hearing in violation" of the Fourteenth Amendment to the United States Constitution. This argument is specious. The issue was not raised in any court below. It was not suggested in the trial court. It was not raised in the Texas appellate courts.

Rule 23(f) of the Revised Rules of The Supreme Court of the United States requires that a petition for writ of certiorari to a state court must demonstrate with specificity that the federal questions sought to be reviewed were appropriately raised in both the state "court of first instance and in the appellate court." This rule embodies a long line of case authority holding that this Court will not consider federal constitutional issues raised for the first time in a petition for writ of certiorari to review a state court decision. *E.g., Monks v. New Jersey,* 398 U.S. 71 (1970); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). Accordingly, petitioners' first argument is to be rejected because it is made for the first time in this Court.

The argument is also specious as a matter of fact. The sole reference to the record on which petitioners base their first argument is the bench comments of the trial judge, taken out of context, which occurred on April 5, 1973, some twenty months before the February 1975 hearing which petitioners attack as unfair. It is true that at pages 479 through 481 of the record the trial judge candidly stated that he had confidence in the receiver and his staff and often followed the receiver's recommendation when knowing only the "general outline" of a matter. This is, of course, true in any receivership, as no judge has the time to be the chief executive officer of a company is receiver-

ship and review in detail every decision that must be made in managing the company.

The comments in no respect related to any issue in the part of the receivership proceedings under review here, and petitioners made no point about them for four and a half years. The first time that they are mentioned is in petitioners' petition for a writ of certiorari to this Court. At no time did petitioners suggest that the trial judge recuse himself.

Petitioners cannot point to any issue involving either of them where the trial judge did not fully, carefully and impartially consider each and all of the relevant facts and petitioners' arguments before rendering a decision. Specifically, with respect to the hearing on the basis of which the trial judge entered the order appealed from, the judge conducted a full scale, ten day plenary hearing at which petitioners were represented by at least seven lawyers who were allowed to adduce virtually all evidence they desired and to cross-examine respondents' witnesses in the minutest detail. The suggestions that the trial judge did not impartially conduct the hearing below; that he was not fully conversant with the issues and facts flowing from a plenary adversary hearing before rendering his decision; or that he did not impartially render that decision, are spurious.

II. **Petitioners' "Full Faith and Credit" Argument Is Without Merit.**

Petitioners' second argument is that the trial court was "without jurisdiction to hear and decide the case and that it gave full faith and credit to an Alabama judgment which was based on an unconstitutional Alabama statute." This argument, likewise, was not raised in the trial court, the Texas Court of Civil Appeals or in the Texas Supreme Court, and thus is due to be rejected on this ground, as petitioners' first argument.

It also is wholly without merit on the facts. The trial judge did not give full faith and credit to any Alabama judgment before authorizing the Texas ancillary receiver to transfer Empire assets to the domiciliary receiver. The sole issue before the trial court was whether on the basis of all the facts and circumstances adduced at the evidentiary hearing below, it was in the best interests of Empire's policyholders and creditors for Empire's policies to be reinsured pursuant to the Protective Treaty. There is not a single place in the record in which the trial court indicates that on this issue it was deferring to the judgment of any court, much less giving any Alabama judgment "full faith and credit."

In any event, Empire's insolvency was not established by an "arbitrary" devaluation of an Empire asset by the Alabama Commissioner of Insurance, as urged by petitioners. It was established by a judicial determination by the Alabama receivership court following an adversary hearing at which Moody appeared and was represented by counsel (Rec. Exh. 9). This determination was based on abundant evidence, as demonstrated in our response in *Moody v. State ex rel. Payne,* No. 77-428 (Resp. Br., p. 9).

III. **Petitioners Were in No Respect Denied Due Process of Law.**

Petitioners' third argument is that the failure of the court below to provide policyholders, stockholders and creditors of Empire with notice of the hearing violated the due process clause of the Fourteenth Amendment. This argument is without merit for two reasons. *First,* both of the Moody cousins had notice of the hearing below. Not only did they have actual notice, both attended the hearing and were represented by counsel. Moody had six lawyers. They presented evidence and cross-examined the receivers and Protective's witnesses. In fact, three separate

Moody lawyers cross-examined Protective's principal witness, such examination consuming over 300 pages of transcript.

Thus, there is no conceivable way that either of the petitioners can complain that he was not accorded due process. Rather, petitioners seek to become the constitutional guardians of the policyholders and stockholders who did not receive notice of the hearing. It is a settled canon of constitutional law, however, that one party will not be allowed to assert the constitutional rights of another. *See Laird v. Tatum*, 408 U.S. 1 (1962); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1965).

Second, the failure to notify policyholders and stockholders did not deny constitutional rights of either. With respect to policyholders, authorizing the ancillary receiver to cooperate in the consummation of the Protective treaty did not deprive any policyholder of any right whatsoever. Upon Empire's being found insolvent, the policyholders has a single right and that was to file a claim as a creditor against the Receiver for breach of the insurance contract. Such claims would be for the amount of the policies' cash values and the policyholders would share *pro rata* with other creditors in the company's assets. 19 Appleman, *Insurance Law & Practice* § 11061 at 672. Every policyholder had this right before the hearing below and every policyholder had the right following it. The result of the hearing was the approval of a realistic and indeed much more attractive option whereby the Empire policyholders could continue to have life insurance protection under their policies in lieu of filing a claim for breach of contract. Thus, far from depriving the policyholders of anything, the order below resulted in availing them an additional opportunity to transfer their policies to a solvent established company instead of filing a claim against the receiver.

The petitioners apparently argue at page 30 that the few policyholders who file claims against the Receiver will recover less than they would have had not all of Empire's assets except

$2,000,000 been transferred to Protective. Again, as neither of the petitioners is in this class of rejecting policyholders, neither has any justiciable interest in this point. In any event, the contention is demonstrably erroneous. Petitioners fail to point out that for each policyholder who rejects reinsurance and files a claim against the Receiver, Protective has agreed to and is obligated to transfer to the $2,000,000 fund retained by the Receiver assets equal to the cash value of the rejecting policyholder's policy less the moratorium amount (Rec. Exh. 9, p. 38). This means that the $2,000,000 fund retained by the Receiver will be increased by the aggregate amount of the cash values of rejecting policyholders less the moratorium amounts.

With respect to stockholders, as was pointed out in Case No. 77-428, all Empire stockholders received written notice of the plenary hearing on whether Empire should be liquidated and the Protective Treaty approved by the Alabama receivership court. No tenable argument can be made that each was entitled to a second notice of the collateral trial which was held in Texas.

In addition, as even Moody's own expert witness pointed out, there were compelling practical reasons for not notifying policyholders of the hearing (R., pp. 974-977; R. 282-283). Such notice, in advance of approval of the Protective Treaty, would have resulted in a very large number of policyholders rushing to cash in their policies while the Receiver's cash lasted, with the result that Empire's cash resources would have been depleted and its premium income critically reduced (*Id.*). Protective then would have had the right to withdraw from its agreement, which would have resulted in straight liquidation, which the uncontroverted evidence shows would have been disastrous (R. 1759).

IV. The Arguments of Unlawful Discrimination Are Wholly Unmeritorious.

Petitioners' fourth argument is that the Protective Treaty unlawfully discriminated among Empire's policyholders, stockholders and creditors. It is indeed interesting to observe how many times an argument can be reprinted in ongoing litigation. This argument was belatedly made in the Alabama trial court, and rejected; it was repeated to the Alabama Supreme Court, and rejected; it was repeated to this Court in Case No. 77-428, after which certiorari was denied; it was made in the Texas trial court, and rejected; it was repeated to the Texas Court of Civil Appeals, and rejected; it was repeated to the Texas Supreme Court, and rejected; it is now repeated again to this Court.

The Texas Court of Civil Appeals cogently rejected it in the proceedings below, as follows:

> The appellants assert a number of reasons why they say the agreement establishes unlawful discriminatory preferences among Empire's policyholders and creditors. We overrule these contentions.
>
> . . . The appellants' argument is erroneously based upon the premise that all Empire policies are alike and must therefore be treated identically in the reinsurance contract. The record shows that the policyholders come from many different companies with many different plans and policies, and its supports the determination that treating the different policyholders identically in the reinsurance plan and ignoring the various policy distinctions would result in unfair discrimination. Rather, the agreement identifies each unusual or unique group and treats it with special provisions formulated to produce equitable benefits for all. It is axiomatic that a different classification and treatment of persons based on real and substantial differences between them is not per se unlawful discrimination. See 12 Tex.

> Jur.2d 458, Constitutional Law, § 111. Such different treatment is often necessary, as it is here, to *avoid* unlawful discrimination.
>
> * * *
>
> Obviously, policyholders who accept reinsurance and the eventual restoration of all policy benefits which come with it are treated differently from those who reject. But every policyholder has his choice and makes it voluntarily. At any given point in time all policyholders are treated precisely the same in relation to the moratorium. Different treatment as a result of a voluntary election can hardly be classified as arbitrary or unfair discrimination. In any event, the plan provides that Protective will transfer to the receiver assets equal in value to the reserve liability for every policy of every rejecting policyholder less the moratorium amount on each such policy. The Receiver can then pay this amount to the rejecting policyholder. This payment approximates the initial value of the agreement to policyholders who accept reinsurance, and thus produces equal treatment of accepting and rejecting policyholders as closely as it can be done.
>
> In addition to the terms we have cited for payment of claims of rejecting policyholders, the agreement provides for the receiver to retain an additional $2 million for payment of the claims of other creditors which have not been assumed by Protective. Under the testimony, this fund is sufficient to treat all such claims equitably. There is no discrimination.
>
> *Moody v. State*, 538 S.W.2d 158, 159-60 (Ct.Civ. App.-Waco 1976).

Petitioners do not demonstrate in any way how this analysis by the Texas Court of Civil Appeals is erroneous either as a matter of law or fact.

Not only are the discrimination arguments completely without merit on the facts, but neither Moody nor Bleker has any standing to assert them, as neither is in any group which is allegedly discriminated against.[4]

In an attempt to shorten this brief, rather than to respond to the specific contentions piecemeal we have reproduced our response made in the courts below as Appendix A to this brief.

V. **Petitioners' Fifth Argument Is Wholly Unmeritorious.**

Petitioners' fifth argument is that the entire ancillary receivership proceedings below were invalidly instituted. Petitioners seek to couch this argument as one involving "equal protection of the laws." In fact, the argument raises nothing but state law issues rejected in the state courts below. In any event, if petitioners are correct on state law, as they demonstrably are not, the ancillary receiver never had jurisdiction over any of Empire's assets and thus in 1975 they were properly transferred to the domiciliary receiver who otherwise had jurisdiction over them.

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[4] A possible exception is that Moody claims to be a creditor of Empire as a result of several transactions antedating the receivership. With respect to Moody's creditor claims, the Court of Appeals found that the $2,000,000 fund retained for the payment of such claims was "sufficient to treat all claims equitably." This conclusion is amply supported by the record (R. 160-164).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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Proof of Service

Proof of service of three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari upon all parties separately represented by counsel was filed by Drayton Nabers, Jr., a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.

APPENDIX

REPLY POINT ONE (RESTATED)

> **The Trial Court Properly Approved the Protective Reinsurance Proposal Because It Protected the Interests of the Policyholders and Creditors of Empire in a Fair and Non-Discriminatory Fashion. (In Reply to Points One Through Eleven)**

Petitioners have reproduced in Points One through Eleven their "laundry list" of "discrimination" complaints presented to the District Court. In formulating those points, Petitioners have failed to show their interest in asserting certain claims because almost invariably they are wholly unaffected by the "discrimination" of which they complain. Petitioner Moody is not a policyholder of Empire and therefore has no standing to object to any feature of the plan as it relates to policyholders. Petitioner Bleker is a policyholder and stockholder (S.O.F. 608). However, as we shall show below the claimed "discrimination" does not affect Bleker. Petitioners lack standing and a justiciable interest to assert complaints regarding facets of the agreement which do not affect them. It is a generally accepted rule that only one who has been harmed by an action has standing to attack that action. The Supreme Court has succinctly stated the rule:

> The law is well established that only those against whom a discrimination is made by statute can invoke the benefit of the Constitution and laws preventing such discrimination. **Oil Well Dlg. Co. v. Associated Indemnity Corp.,** 264 S.W. 2d 697-700 (Tex. 1954).

Even if Petitioners be granted standing, it would appear that much of their argument proceeds from the erroneous premise that policyholders and other creditors are on a complete parity. Reference to both Texas and Alabama law indicates that this premise is erroneous. Art. 21.39-A, the Texas Asset Protection

Act, clearly provides for "preferential claims against assets in favor of owners, beneficiaries, assignees, certificate holders, or third-party beneficiaries of insurance policies." Art. 21.39-A, Texas Ins. Code. Likewise, Act No. 1040, 1975 Sess., Ala. Legis. provides:

> [A]ll beneficiaries of and all persons holding or owning a contract of insurance with [an insurer in receivership] shall be a preferred creditor . . . Policyholders are hereby removed from the class of general creditors and all laws and court decisions in conflict herewith shall have no further application. This Act shall apply to all policyholders of insurers in receivership on the effective date of this Act . . .

Therefore, it is clear that Petitioners' basic premise is erroneous and their arguments regarding discrimination between policyholders and other creditors must fall.

In any event even a cursory examination reveals that Petitioners' claims of discrimination are totally without merit. The Petitioners proceed on the premise, that every Empire policyholder is just like every other policyholder and therefore the treaty must treat each one identically. This premise is false as the evidence abundantly shows. Empire policyholders result from a hodge podge of companies put together in a long series of improvident mergers and acquisitions masterminded by Moody (S.O.F. 1401). The testimony shows that the 40,000 policyholders came from dozens of different companies with scores of different insurance plans and policies (S.O.F. 1371-1372, 1399, 1401, 1737-1738). If Protective had treated every policyholder identically ignoring the special and unique terms of the various policies, this would have resulted in inequitable and unfair discrimination. Rather Protective identified each unusual or unique group of policyholders and treated it with special provisions geared to produce equitable benefits with the others (R. Exh. 6, pp. 6-9, 19-20, 22, 24, 34). This, of course, resulted in different treatment but only because certain policies had materially different terms and conditions. The law has always allowed different treatment for persons situated differently. See **Board of Ins. v. T.E.I.A.,** 189 S.W.2d 47, aff'd 192 S.W.2d 149 (Tex. 1946). There, the Court of Civil Appeals held that Article 21.21 does not prevent "distinctions and differences in the payment of dividends between groups or between policyholders within groups based upon loss experiences within or between groups. . . ." *Id.* at 53. In other words, a proper classification based on real differences does not amount to unlawful discrimination. See *Rucker v. State,* 342 S.W.2d 325 (Tex.Crim.App.—1961); *Langdeau v. Bouknight,* 344 S.W.2d 435 (Tex. 1961). In fact such different treatment is often necessary to avoid unlawful discrimination.

We now discuss each example of discrimination claimed by Petitioners separately.

1. There Is No Unfair Discrimination Against Policyholders Who Reject Reinsurance.

Petitioners argue that the policyholders such as Bleker who have accepted reinsurance have been favored over those who voluntarily elected to reject reinsurance. It is indeed impossible to understand how Moody who is not a policyholder and Bleker who benefits from the claimed discrimination have standing to raise this point, but in any event it is absolutely spurious.

It is, of course, obvious that policyholders who accept reinsurance and Protective's guarantee of the restoration of all policyholder benefits are treated differently from those who reject and file a claim against the receiver for breach of contract. Every policyholder has this choice and makes it voluntarily. Different treatment as a result of a voluntary election can hardly be classified arbitrary or unfair discrimination.

In any event, the treaty contains meticulously detailed provisions, completely ignored by Petitioners, to assure that equities between these two groups are maintained as nearly as possible. The Treaty provides that Protective will transfer to the Receiver assets equal in value to the reserve liability for every policy of every rejecting policyholder less the moratorium which would have been applicable to the policy (R. Exh. 6, pp. 37-38). The receiver can then pay this amount out to each rejecting policyholder. This payment approximates the initial value of the treaty to policyholders who accept reinsurance and thus produces equity as closely as possible between accepting and rejecting policyholders (S.O.F. 62-63, 1735-1736).

The fact which Petitioners try to build their argument on is that Protective is entitled to file a claim against the Receiver on behalf of accepting policyholders in the amount of the moratorium for each policy. This, say the Petitioners, gives accepting policyholders "two bites at the apple." Regardless of how many bites at the apple accepting policyholders may have, this does not result in any discrimination. Certainly the receivership court will pay Protective's claims on behalf of accepting policyholders only if it would promote equality of treatment between accepting and rejecting policyholders. The Protective claim merely allows the receivership court to make a distribution to Protective for the benefit of accepting policyholders in the event that funds in the receiver's possession allow payment to rejecting policyholders in excess of the value of the reinsurance treaty to accepting policyholders (S.O.F. 434-436). In such circumstances unless a distribution is made to Protective for accepting policyholders, they will be unfairly discriminated against. Protective's claim is therefore an equalizing device and in no respect an instrument of discrimination.

2. **There Is No Unfair Discrimination Against Creditors Whose Claims Are Not Assumed by Protective.**

Petitioners make a bevy of arguments that certain creditors whose claims were not assumed by Protective have been discriminated against. First they argue that there was no evidence that the $2,000,000 fund to be retained by the Receiver for payment of such creditor claims is adequate. This is simply not the case. Uncontroverted evidence shows that this fund is amply sufficient for this purpose (S.O.F. 160-164). Petitioners also argue certain groups of creditors have had their claims accepted by Protective whereas others have not. Protective, quite justifiably was interested in Empire's policyholders and had no interest in litigating and resolving the host of claims not relating to Empire's life insurance policies. But any creditor whose claims has not been accepted by Protective may file a claim against the Receiver and be paid from the $2,000,000 fund which the evidence shows is more than adequate to treat all such claims equitably (*Id.*).

3. **There Is No Unfair Discrimination for or Against United Founders, PSIP and SPP5O and American Trust Policyholders.**

a. **United Founders.**

The undisputed evidence shows that the United Founders' policyholders are in a unique position in that none of them have any contract with Empire (S.O.F. 1394-1396, 1734-1735). Rather their policy is with United Founders of Illinois. United Founders in turn has a co-insurance agreement with Empire. It is therefore not surprising that the terms of Protective's treaty deal specially with this unique situation. The evidence shows clearly, however, that payments to United Founders under the Treaty result in equitable and fair treatment to all policyholders

and Moody's own expert witness specifically acknowledged that no discrimination resulted from these provisions (S.O.F. 1394, 1396, 1734-1735, 656-657) and Petitioners are unable to point to any instance in which the treaty's provisions for the United Founders co-insurance agreement could result in any inequity. It should be noted that Bleker is not a United Founders policyholder.

b. **The PSIP-1 and SPP5O Policies.**

Similarly, the different treatment for PSIP-1 and SPP-5O policies, at page 19 of the Treaty, results from the fact that the benefits for these policies are payable in part from so-called separate accounts unlike the balance of the Empire policies (R. Exh. 9, p. 19). A separate account is an account which is maintained apart from Empire's general asset accounting based on a part of premiums specifically allocated to the separate accounts. Policy benefits relate to the amount of the special account. To have ignored this special status would have resulted in arbitrary discrimination against these policyholders. Again Bleker does not have a PSIP-1 or a SPP5O policy.

c. **American Trust.**

It is indeed surprising that the Moody cousins seek to show inequity of treatment by reference to the American Trust policyholders as this example graphically demonstrates the total disregard of policyholder rights shown by Moody when he was running Empire. Empire merged with American Trust Life Insurance Company. The merger agreement stipulated that Empire would maintain American Trust assets in a separate account for the benefit of American Trust policyholders. Moody, however, completely ignored this commitment and transferred good, income producing assets out of the American Trust account into Empire's general funds thus destroying the special

account created by the merger agreement and the protections it was to give the American Trust policyholders (S.O.F. 1382-1386, 1734).

Petitioners nevertheless argue that Protective should be faulted for not basing the benefits under its treaty on the special account which Moody destroyed. The evidence shows that if Protective had so based benefits to the American Trust policyholders, it would have resulted in much lower benefits to them than to other policyholders, thus putting in concrete the undermining of the merger agreement by Moody (*Id.*). Bleker is not an American Trust policyholder.

4. **There Is No Unfair Discrimination Against Policyholders Who Elect Paid-Up or Extended Term Insurance.**

The reinsurance treaty specifies in detail how policyholders are to be treated if they elect paid-up or extended term insurance (R. Exh. 9, pp. 21-22). These elections are entirely voluntary and every policyholder who makes the elections is treated precisely the same (S.O.F. 1403-1405). It completely escapes us that Petitioners claim that equal treatment of every policyholder who makes a voluntary election results in unlawful discrimination. In any event Moody is not a policyholder and could care less about this option and as Bleker's policy is fully paid up, it can have no effect on him.

5. **There Is No Unfair Discrimination Respecting Treatment of Insurance on Moody's Life.**

The First Amendment to the Treaty provides that the Receiver shall assign to Protective the death proceeds of $4,350,000 of the approximately $12,000,000 of life insurance on Moody's life which secures the value of Protective's interest in the Libby Shearn Moody Trust assigned to Protective under

the Treaty (R. Exh. 9, 1st Amdt. p. 3). The Receiver continues to have rights to the balance of the proceeds but the Treaty provides that if the Receiver decides to reduce the amount of the insurance, Protective, by becoming responsible for payment of the premiums, may acquire any part of the Receiver's insurance he decides to terminate. This provision merely allows Protective to take over the Receiver's share of the insurance if Protective disagrees with the Receiver's judgment to terminate the insurance, and it is hard to see how this option could be deemed discriminatory. Certainly if Protective did not have the option, the rejecting policyholders whom Petitioners claim are discriminated against as a result of the option would be no better off. Finally, we point out again that neither Moody nor Bleker rejected reinsurance and therefore neither has any legitimate concern about the status of rejecting policyholders.

6. **There Is No Unfair Discrimination Respecting the Payment of Dividends.**

Petitioners claim that the Treaty unlawfully discriminates in favor of PSIP policyholders in that they and not other policyholders receive "dividends" under the Treaty. The treaty recites and there was no dispute at the trial below on the point that the PSIP "dividend" while denominated a "dividend" is in substance identical to a "pure endowment" which the Treaty provides shall be paid in full (R. Exh. 9, p. 34; S.O.F. 657). Thus, the provision to pay PSIP policyholders "dividends" results in PSIP policyholders being treated equally with other policyholders entitled to payment of pure endowments and Moody's own expert so declared (S.O.F. 657). Contrary to Petitioners' contention failure to treat this so-called dividend as a pure endowment might have resulted in the sort of discrimination of which Petitioners complain.

7. **The Provisions for Work-Out of the Moratorium Do Not Result in Discrimination.**

Petitioners' argument in Point Two is that the Protective Treaty creates "tontine" insurance and unfairly discriminates against policyholders who elect to surrender their policies for cash early in the ten-year moratorium period as opposed to those who may surrender later or after the period has expired. This contention was the subject of extensive testimony at trial which shows overwhelmingly that the formula for reducing the moratorium is equitable and based on economic reality.

The reason for the moratorium, as we had previously explained, is that Empire is insolvent and its assets are worth millions of dollars less than the reserve liabilities of the policies Protective assumes under the Treaty (S.O.F. 1367, 1379). To offset this multi-million dollar gap the moratorium reduces the reserves by limiting the amount of cash the policyholders may voluntarily withdraw under the terms of their policies.

Protective committed to completely eliminate the moratorium and restore all policy benefits by no later than ten years from the effective date of the Treaty. This was possible because under proper management Protective projected that the gap between Empire assets and reserve liabilities would gradually reduce during the ten-year period (Def. Exh. 8, S.O.F. 378-380). As it reduced Protective agreed to reduce the moratorium to equitably reflect the amount of the gap reduction.

One of the reasons this insolvency gap reduces is that policyholders will continue to pay millions of dollars of premiums which will be added to Empire assets and invested at high income yields. The policyholders who do not surrender their policies and continue to pay premiums therefore make an essential contribution to the ultimate work out of the moratorium (S.O.F. 1367-1371, 1732-1733, 1740). The Treaty provides that if they continue to pay premiums, they receive the benefit of this contribution by entitlement to greater cash values as

the moratorium reduces. Those policyholders who cash out early not only do not continue to contribute money but diminish the Empire fund by withdrawing cash which otherwise could be invested at high yields and thereby contribute to the reduction of the moratorium (*Id.*). These facts are absolutely undisputed and when understood, it is clear that to give the policyholders who cash in early treatment with those who cash in later would be grossly unfair.

Thus, though there is different treatment between policyholders who cash out early and those who persist, the economic advantage gained by persisting policyholders is directly related to their contribution to the reduction of the moratorium (*Id.*).

Petitioners argue that "though policyholders are entirely of the same class and may have the same expectation of life, under the Reinsurance Agreement policyholders who decide to cash in their policies or lapse in early years are penalized and much less than policyholders who do not" (App. Br. p. 17). This ignores the critical fact that at any point in time *all policyholders are treated precisely the same*. If the moratorium can be characterized as a "penalty" as Petitioners so characterize it, the "penalty" results from Empire's insolvency caused by Moody and in no respect caused by any Receiver or Protective. The "penalty" will reduce hopefully because Protective will prudently and efficiently manage the shipwreck left by Moody but the simple, immutable economic fact is that the "penalty" cannot be eliminated all at once, but only gradually over a period of years.

Petitioners attempt to brand as discriminatory the treatment of policyholders who withdraw funds on deposit or make a policy loan after the moratorium becomes effective and those who had borrowed in advance of the receivership. However, any plan must incorporate a beginning point. The differing treatment arising from establishment of a cut-off date is not discriminatory.